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BHLB TRUSTEE BERHAD & ANOR

v.

HSBC (MALAYSIA) TRUSTEE BERHAD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S6-23-84-2004]
26 JANUARY 2006

C ***CIVIL PROCEDURE:*** *Pleadings - Statement of claim - Striking out - Application for - Failure to allege malice - Whether plaintiffs failed to set out a cause of action against third defendant - Third defendant wrote alleged libelous letter in capacity as managing director of first defendant - Whether third defendant had prima facie defence of privilege - Whether* D *cause of action in defamation would lie against an employee - Whether plaintiffs' claim and action against third defendant struck out*

TORT: *Defamation - Libel - Allegation of - Alleged libelous letter written in third defendant's course of employment - Whether cause of action in* E *defamation would lie against an employee - Whether third defendant had prima facie defence of privilege*

This was the third defendant's appeal in encl.17 against the order of the deputy registrar dismissing with costs the third defendant's application in encl.11 to strike out the plaintiffs' statement of claim F under the provisions of O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'). The first plaintiff and the first defendant were members of the Association of Trust Companies Malaysia ('ATCM'). The plaintiffs' claim hinged on a letter issued by the first defendant to the ATCM. The said letter was signed by the G third defendant in her capacity as the managing director of the first defendant. The plaintiffs alleged that they were libeled because the natural and ordinary meaning of the first defendant's letter to the ATCM carried defamatory imputations of the plaintiffs generally. It was indisputable that the first defendant's letter to the H ATCM set out a query to the ATCM in respect of matters relating to the guidelines, resolutions and approaches of the ATCM in relation to the fees levied by its members such as the first plaintiff and the first defendant. It was the contention of the third defendant that the publication of the first defendant's letter I to the ATCM was privileged in that it involved the raising of queries by a member of the ATCM of matters of which the ATCM and its members have a direct interest.

Held (allowing the appeal):

(1) The plaintiffs have failed to disclose the following material facts in their pleadings (1) that ATCM duly responded to the first defendant's queries as set out in the first defendant's letter to the ATCM; (2) that the ATCM's response contained specific responses to the queries set out in the first defendant's letter to the ATCM concerning the minimum guidelines on trustee fees and a response stating that no letter seeking clarification from the first plaintiff was ever issued and (3) that the ATCM's response did not suggest that there was anything untoward or improper in respect of the issuance of the first defendant's letter to the ATCM or the contents thereof. The ATCM's response was issued and copied to members of the ATCM, including the first plaintiff, a month before the filing of the writ and the statement of claim herein. The ATCM's response supported the contention that the first defendant's letter to the ATCM was published on an occasion of privilege. The failure on the part of the plaintiffs to plead those material facts must be held against them. (paras 8, 9 & 10)

(2) All the relevant averments in the plaintiffs' claim showed that the third defendant wrote the first defendant's letter in the course of her employment and in her capacity as the managing director of the first defendant. No cause of action in defamation would lie against an employee or a managing director of a corporation in respect of a publication issued by a corporation. (para 12)

(3) The first defendant as a member of ATCM has an interest in the matters raised in the first defendant's letter to the ATCM. Likewise, the ATCM and its members have a corresponding interest in the same matter. The plaintiffs in a defamation claim can overcome publication on an occasion of privilege by proving that the relevant publication was actuated by malice. The only malice alluded to in the plaintiffs' claim herein was that of the first defendant. The plaintiffs have not pleaded malice on the part of the third defendant. In a desperate attempt and following the filing of the third defendant's application in encl. 11, the plaintiffs have included an averment in the plaintiffs' affidavit suggesting that the third defendant had maliciously published the first defendant's letter. Such an averment was absent from the pleadings. The plaintiffs must

A plead all the material facts and that any defect or omission in the statement of claim could not be subsequently made good by affidavit evidence. There was nothing in the plaintiffs' claim which suggested that the third defendant would not be able to successfully rely on the defence of privilege in relation to
B the first defendant's letter to ATCM. (para 20)

(4) The third defendant was merely the passive conduit pipe through which the first defendant, being an artificial entity, had issued that controversial letter referring to the first
C defendant's letter to the ATCM. The parties were bound by their pleadings and that the tort of defamation required a special treatment in so far as drafting the statement of claim was concerned. In failing to allege malice in the statement of claim against the third defendant, the plaintiffs have failed to
D set out a crucial element of a cause of action against the third defendant. (para 22)

(5) The ATCM's response clearly indicated that the first defendant had a legitimate right or interest as a member of
E ATCM to make the queries contained in the first defendant's letter to the ATCM. The plaintiffs were aware of the ATCM's response and yet they proceeded to file these proceedings without disclosing it. The plaintiffs too have failed to give any reasonable explanation for omitting to plead the ATCM's
F response. There was no legitimate basis or explanation for the plaintiffs to file a claim against the third defendant (who would have a *prima facie* defence of privilege) and yet the plaintiffs failed to plead malice on the part of the third defendant. (para 23)

G **(6)** Prior to the filing of the proceedings herein the plaintiffs had issued a pre-action letter of demand against the first defendant and the second defendant, seeking, *inter alia*, an apology and compensation of RM3 million arising from the publication of the first defendant's letter to the ATCM. No allegation or
H complaint was leveled against the third defendant. There was no mention or reference to the third defendant at all. No pre-action letter of demand similar to the ones that were sent to the first and second defendants was ever issued by the plaintiffs against the third defendant in her personal capacity.
I (para 24)

[Plaintiffs' claim and action against the third defendant should be struck out forthwith.]

Case(s) referred to:

Addis v. Crocker [1961] 1 QB 11 ***(refd)***
AG v. BBC [1981] AC 303 ***(refd)***
Anderson v. Gorrie [1895] 1 QB 668 ***(refd)***
Attwood v. Chapman [1914] 3 KB 275 ***(refd)***
Baharuddin Ali & Co v. BPMB Urus Harta Sdn Bhd & Anor [2000] 4 CLJ 693 HC ***(refd)***
Bottomley v. Brougham [1908] 1 KB 584 ***(refd)***
Bruce v. Odhams Press Ltd [1936] 3 All ER 294 ***(refd)***
Chatterton v. Secretary of State for India [1895] 2 QB 189 ***(refd)***
Conerey v. Jacklin [1985] Crim LR 234 ***(refd)***
Conway v. Rimmer [1968] AC 910 ***(refd)***
Dawkins v. Lord Paulet [1869] LR 5 QB 94 ***(refd)***
Dawkins v. Lord Rokeby [1873] LR 8 QB 255 ***(refd)***
Duncan v. Cammell Laird & Co Ltd [1942] AC 624 ***(refd)***
Farmer v. Hyde [1937] 1 KB 728 ***(refd)***
Fayed v. Al-Tajir [1988] QB 712 ***(refd)***
General Medical Council v. Spackman [1943] AC 627 ***(refd)***
Goffin v. Donnelly [1881] 6 QBD 307 ***(refd)***
Hasselblad (GB) Ltd v. Orbinson [1985] QB 475 ***(refd)***
K Surjit Kaur Gean Kartar Singh v. Belinda Ghoi Shuk Yee [2003] 2 MLJ 91 ***(refd)***
Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corp Bhd and Another Suit [2003] 2 CLJ 520 HC ***(refd)***
Lake v. King [1670] 1 Saund 131 ***(refd)***
Lincoln v. Daniels [1962] 1 QB 237 ***(refd)***
Lynam v. Gowring [1880] 6 LR Ir 259 ***(refd)***
M Isaacs & Sons Ltd v. Cook [1925] 2 KB 391 ***(refd)***
Malayan United Finance Bhd lwn. Cheung Kong Plantation Sdn Bhd & Lain-lain [2000] 2 CLJ 601 HC ***(refd)***
McCarey v. Associated Newspapers Ltd [1964] 2 All ER 335 ***(refd)***
Minter v. Priest [1930] AC 558 ***(refd)***
MP Nathan v. Valaithan Raman [2003] 6 CLJ 448 HC ***(refd)***
Neill v. Henderson [1901] 3 F 387 ***(refd)***
O'Connor v. Waldron [1935] AC 76 ***(refd)***
Philipps v. Philipps [1878] 4 QBD 139 ***(refd)***
Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(refd)***
Riddick v. Thames Board Mills Ltd [1977] QB 881 ***(refd)***
Rivlin v. Bilainkin [1953] 1 QB 485 ***(refd)***
Rogers v. Home Secretary [1973] AC 388 ***(refd)***
Royal Aquarium and Summer and Winter Garden Society Ltd v. Parkinson [1892] 1 QB 431 ***(refd)***
Seaman v. Netherclift [1876] 2 CPD 53 ***(refd)***
Scott v. Sampson [1882] 8 QBD 491 ***(refd)***
Scott v. Stansfeld [1868] LR 3 Exch 220 ***(refd)***

A *Sim v. Stretch [1936] 2 All ER 1237* ***(refd)***
Slack v. Barr [1918] 1 SLT 133 ***(refd)***
Smith and National Meter Co [1945] KB 543 ***(refd)***
Tadd v. Eastwood [1985] 1 CR 132 ***(refd)***
Toogood v. Spyring [1834] 1 Cr M & R 181 ***(refd)***
B *Trapp v. Mackie [1979] 1 All ER 489* ***(refd)***
United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1982] CLJ 547; [1982] CLJ (Rep) 358 FC ***(refd)***
Watson v. M'Ewan [1905] AC 480 ***(refd)***
Wason v. Walter [1868] LR 4 QB 73 ***(refd)***

C **Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 19(1)(a), (d)

For the plaintiffs - Dinesh Nair; M/s How, Zul & Low
For the 3rd defendant - Christopher KF Foo (Mark La Brooy with him); M/s Raja, Darryl & Loh

D *Reported by Suhainah Wahiduddin*

JUDGMENT

E **Abdul Malik Ishak J:**

Introduction

[1] This is the 3rd defendant's appeal in encl. 17 against the
F order of the learned deputy registrar dated 19 April 2005 whereby the latter dismissed with costs the 3rd defendant's application in encl. 11 to strike out the plaintiffs' statement of claim under the provisions of O. 18 r. 19 of the Rules of the High Court 1980 ("RHC").

G **[2]** The 3rd defendant goes by the name of Lim Liang Hua and she is the appellant herein and she is also the managing director and an employee of the 1st defendant by the name of HSBC (Malaysia) Trustee Berhad. It is the 3rd defendant who is applying
H to strike out the plaintiffs' claim. The 2nd defendant is a public limited liability company by the name of HSBC Bank Malaysia Berhad.

[3] The 1st plaintiff by the name of BHLB Trustee Berhad is a
I registered limited liability trust company while the 2nd plaintiff by the name of Lim Yoke Long is the chief executive officer of the 1st plaintiff.

The Law

[4] The law journals are replete with authorities on the principles underlying an application under O. 18 r. 19 of the RHC. Suffice, for the present exercise, to state the law in the following manner:

(1) that a party may apply to strike out based on any or all the limbs of O. 18 r. 19(1)(a) to (1)(d) of the RHC;

(2) that the court may consider the affidavit evidence filed in respect of an application which is not solely based on limb (1)(a) of O. 18 r. 19 of the RHC (*Malayan United Finance Bhd lwn Cheung Kong Plantation Sdn Bhd dan Lain-lain* [2000] 2 CLJ 601; and *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, SC); and

(3) what was said by the late Peh Swee Chin SCJ in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd (supra)* merits reproduction (see p. 24 of the report):

> We must emphasise that for any court to reach such a similar decision on an application under O. 18 r. 19, there must, in all probability, have been an absence of conflict of material evidence or of conflict of affidavits on material points so that seemingly triable issues, seemingly difficult ones, could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

The Facts As Set Out In The Plaintiffs' Statement Of Claim

[5] The 1st plaintiff and the 1st defendant are members of an association known as the Association of Trust Companies Malaysia ("ATCM"). The plaintiffs' claim hinged on a letter issued by the 1st defendant dated 5 November 2004 to the ATCM (hereinafter referred to as "the 1st defendant's letter to the ATCM"). The plaintiffs' alleged that the 1st defendant had falsely and maliciously issued the 1st defendant's letter to the ATCM. Before I proceed any further, it is ideal to reproduce the 1st defendant's letter to the ATCM and it is worded as follows (see exh. "LLH2" in encl. 11A):

A HSBC HSBC
HSBC (M) TRUSTEE BHD
2004 NOV - 5 PM 4: 21

5 November 2004

B Association of Trust BY FAX
Companies Malaysia
Unit A-11-7, 11th Floor, Megan Avenue 1
No 189 Jalan Tun Razak
50400 Kuala Lumpur

C Mr Cheah Boon Hoe, Chairman/Pn Shahidah Hashim, Secretary

Dear Sir/Madam

ACTM Unit Trust Scheme Fees

D Thank you for your letter of 3 November 2004 in respect of our trustee fee for Prudential Unit Trust Berhad.

For the same management company, we enclose the following quotes from BHLB Trustee (Treasurer of ACTM) and Bumiputra-Commerce Trustee (Secretary of ACTM) for your
E kind attention:

1. BHLB Trustee's quote by Mr Joshua Lim, CEO was 0.0375% per annum, and

2. Bumiputra-Commerce Trustee's quote by Puan Hjh
F Shahidah, General Manager was 0.04% per month for first 3 financial years and 0.045% per month thereafter.

Please let us know if a similar letter from ACTM has been sent to BHLB Trustee and Bumiputra-Commerce Trustee respectively
G before we respond to your letter.

Yours faithfully

sgd

Lim Hiang Hua
H Managing Director

c.c. All members of ACTM (By Fax Only)

HSBC(Malaysia) Trustee Berhad
(Company No. 001281-T)
I Level 1 Annexe, Menara Milenium, Jalan Damanlela
Pusat Bandar Damansara, Damansara Heights, 50490 Kuala Lumpur.
Tel: 03-2090 5999 Fax: 03-2092 1572, 2092 1576.

[6] As can be seen this very letter was signed by the 3rd defendant in her capacity as the managing director of the 1st defendant. It seems that the basis of the plaintiffs' cause of action against the 1st and the 3rd defendants arises out of the publication of the 1st defendant's letter to the ATCM. To be precise, the plaintiffs' claim alleges that the plaintiffs were libelled because the natural and ordinary meaning of the 1st defendant's letter to the ATCM carries defamatory imputations of the plaintiffs generally. In the alternative, the plaintiffs aver that the 1st defendant's letter carries a defamatory meaning by way of an innuendo. By their natural and ordinary meaning the statements may be innocuous but because of certain circumstances known to those to whom the statements were made, they may affect the plaintiffs adversely. This is what the plaintiffs are saying. The statements may be described as defamatory by innuendo. But the defences open to the defendants are certainly varied. For this exercise, I will not dwell on them in detail.

[7] Be that as it may, it is indisputable that the 1st defendant's letter to the ATCM sets out a query to the ATCM in respect of matters relating to the guidelines, resolutions and approaches of the ATCM in relation to the fees levied by its members such as the 1st plaintiff and the 1st defendant. It is equally indisputable that the 1st defendant's letter to the ATCM was published only to the other members of the ATCM with no external publication or circulation. No where in the plaintiffs' claim is it alleged or even suggested that a member of the ATCM, such as the 1st defendant, is unable to raise queries with the ATCM in respect of matters relating to the ATCM's guidelines and resolutions concerning its members.

The Plaintiffs' Failure To Plead And Disclose The ATCM's Response To The 1st Defendant's Letter To The ATCM

[8] It is quite obvious that the plaintiffs have failed to disclose the following material facts in their pleadings (*Bruce v. Odhams Press Ltd.* [1936] 3 All ER 294):

(1) that ATCM duly responded to the 1st defendant's queries as set out in the 1st defendant's letter to the ATCM and the ATCM's letter dated 10 November 2004 (hereinafter referred to as "the ATCM's response") can be seen at exh. "LLH4" of encl. 11A);

(2) that the ATCM's response contains the specific responses to the queries set out in the 1st defendant's letter to the ATCM concerning the minimum guidelines on trustee fees and a response stating that no letter seeking clarification from the 1st plaintiff was ever issued; and

(3) that the ATCM's response does not suggest that there was anything untoward or improper in respect of the issuance of the 1st defendant's letter to the ATCM or the contents thereof.

[9] The ATCM's response was issued and copied to members of the ATCM, including the 1st plaintiff, a month before the filing of the writ and the Statement of Claim herein and the plaintiffs have not denied receiving the ATCM's response. For brevity, I must now reproduce the ATCM's response (see exh. "LLH4" of encl. 11A):

ATCM

Association of Trust Companies Malaysia

10 November 2004 IMMEDIATE ATTENTION
By Fax No: 2092-5999
and/by AR Registered

HSBC(M) Trustee Berhad
6th Floor Wisma Maran
28 Medan Pasar
50050 Kuala Lumpur
Attention: Ms Lim Liang Hua

Dear Sirs,

Minimum Trustee Fee On Unit Trust Scheme Written Clarification

We refer to your letter dated 5th November 2004 and the attachment referred therein with regard to the above subject matter.

Please be informed that ATCM did not provide any guideline to regulate minimum trustee fee on cash management funds and custodian services in relation to assets in trust accounts pursuant to section 47C(10)(d) of the Securities Industry Act 1983.

Please enclosed herewith the minutes of ATCM dated 04/06/2002, 27/06/2002, 25/07/2002 and 26/07/2002 for your reference.

Notwithstanding the above, we took cognizance of your queries in the aforesaid letter and hereby wish to advise that ATCM did not send a similar letter, seeking for clarification from Bumiputra-Commerce Trustee Berhad and BHLB Trustee Berhad for there is no issue arising on minimum trustee fees on Unit Trust Scheme after having perused the content and subject matter of the letters referred thereto in your letter.

In view of the above we would appreciate your good office would on soonest possible furnish no later than 17/11/04, a written explanation on the alleged breach set out therein our letter to your good office dated 03/11/04.

Thank you.

Yours truly,

sgd	sgd
Cheah Boon Hoe	Shahidah Hashim
Chairman	Secretary

c.c: All ATCM Members (by Fax Only).

[10] It is the contention of the 3rd defendant that the publication of the 1st defendant's letter to the ATCM was privileged in that it involved the raising of queries by a member of the ATCM of matters of which the ATCM and its members have a direct interest. In the context of this case, it relates to the guidelines, resolutions and approaches of the ATCM in relation to the fees levied by its members. It can readily be surmised that the ATCM's response wherein the plaintiffs have failed to disclose and plead supports the contention that the 1st defendant's letter to the ATCM was published on an occasion of privilege. The failure on the part of the plaintiffs to plead those material facts must be held against them. According to Cotton LJ in *Philipps v. Philipps* [1878] 4 QBD 139 "that it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial." And according to Scott LJ in *Bruce v. Odhams (supra)* if any one "material" statement is omitted, the statement of claim is bad. Brett LJ in *Philipps v. Philipps (supra)* observed that:

If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings.

A **The Plaintiffs' Claim Discloses No Cause Of Action Against The 3rd Defendant**

[11] Quite apart from the issue in regard to the plaintiffs' failure to disclose and plead the ATCM's response, the plaintiffs themselves aver that the 3rd defendant wrote the 1st defendant's letter to the ATCM in her capacity as the managing director of the 1st defendant. It is a common ground that the 3rd defendant is not a member of the ATCM and has no personal or other interest in the affairs of the ATCM save in her capacity as the managing director of the 1st defendant. The plaintiffs have never suggested let alone pleaded that the 3rd defendant issued and published the 1st defendant's letter to the ATCM in her personal capacity. It must be borne in mind that the issuance of the 1st defendant's letter to the ATCM fell under the sole purview of the 3rd defendant because she is the current and was, at the material time, the managing director of the 1st defendant. In fact, nothing in the plaintiffs' claim suggests otherwise.

[12] There is not a single averment in the plaintiffs claim which suggests or in anyway suggests that the 3rd defendant authored the 1st defendant's letter to the ATCM in anything other than in her capacity as the managing director. All the relevant averments in the plaintiffs' claim show that the 3rd defendant wrote the 1st defendant's letter in the course of her employment and in her capacity as the managing director of the 1st defendant. It is rather interesting to note that the plaintiffs admit on affidavit that the 1st defendant's letter was written by the 3rd defendant both in her capacity as the managing director of the 1st defendant and as an employee of the 1st defendant. The law is clear in that no cause of action in defamation would lie against an employee or a managing director of a corporation in respect of a publication issued by a corporation (*Baharuddin Ali & Co v. BPMB Urus Harta Sdn Bhd & Anor* [2000] 4 CLJ 693; and *MP Nathan v. Valaithan Raman* [2003] 6 CLJ 448).

[13] It is rather difficult to define the meaning of the word "defamation." It is a daunting task. What may be defamatory a hundred years ago may not be defamatory today. No definition can be said to be all embracing and faultless. From the authorities, it is said that libel is defamation in a permanent and visible form. Slander, on the other hand, is said to be defamation by way of spoken words and it may include disparaging gestures or actions. Speaking generally, defamation may be defined in this way:

(a) according to *Fraser on Libel and Slander* (7th edn) at p. 3, it is a statement concerning any person which exposes him to hatred, ridicule, or contempt, or which causes him to be shunned or avoided, or which has a tendency to injure him in his office, profession or trade;

(b) according to *Scott v. Sampson* [1882] 8 QBD 491, it is a false statement about a man to his discredit; and

(c) Lord Atkin in *Sim v. Stretch* [1936] 2 All ER 1237 at 1240 posed this pertinent question in an attempt to define the word "defamation": would the words tend to lower the plaintiff in the estimation of right thinking members of society generally?

[14] The time honoured words like "hatred, ridicule or contempt" occur, time and again, in many judgments of other learned Judges before me. They are still quite appropriate although they are far from being comprehensive.

Malice Is Alleged As Against The 1st Defendant And Not The 3rd Defendant

[15] Thus far, the evidence shows that the 1st defendant's letter to the ATCM was published on a privileged occasion. Legally speaking, the defence of absolute privilege is a complete bar to an action for defamation. This is so notwithstanding how false or malicious the words complained of may be. The defence of absolute privilege is different from that of qualified privilege. Absolute privilege cannot be destroyed or watered down by malice. Examples of absolute privilege may be stated as follows:

(1) Parliamentary privilege – statements made in the course of parliamentary proceedings by the Members of Parliament.

(2) Judicial privilege – statements made in the course of judicial proceedings which include certain communications passing between the legal advisers and their clients.

(3) Official privilege – this covers statements made in the course of state proceedings.

(4) Statutory privilege – this covers statements of other public officials which are protected by statute.

(5) Reports of Parliamentary proceedings in whatever forms.

A (6) Newspaper reports of judicial proceedings.

(7) The question of public policy – it bestows immunity from suit upon a defamatory publication.

B **[16]** All these examples are gathered from reading the following authorities:

(a) *Goffin v. Donnelly* [1881] 6 QBD 307;

(b) *Wason v. Walter* [1868] LR 4 QB 73;

C (c) *Lake v. King* [1670] 1 Saund 131;

(d) *Rivlin v. Bilainkin* [1953] 1 QB 485, [1953] 1 All ER 534;

(e) *Royal Aquarium and Summer and Winter Garden Society Ltd* v
D Parkinson [1892] 1 QB 431 at 451, CA;

(f) *AG v. BBC* [1981] AC 303 at 359-60, [1980] 3 All ER 161 at 181-182, HL;

(g) *O'Connor v. Waldron* [1935] AC 76 at 81, PC;

E

(h) *Attwood v. Chapman* [1914] 3 KB 275;

(i) *Smith and National Meter Co* [1945] KB 543, [1945] 2 All ER 35;

F (j) *Tadd v. Eastwood* [1985] 1 CR 132, CA;

(k) *Trapp v. Mackie* [1979] 1 All ER 489 at 492, [1979] 1 WLR 377 at 379;

G (l) *Lincoln v. Daniels* [1962] 1 QB 237 at 253, [1961] 3 All ER 740 at 746;

(m) *Bottomley v. Brougham* [1908] 1 KB 584;

(n) *Dawkins v. Lord Rokeby* [1873] LR 8 QB 255, affirmed *vide*
H [1875] LR 7 HL 744;

(o) *General Medical Council v. Spackman* [1943] AC 627, [1943] 2 All ER 377;

(p) *Lincoln v. Daniels* [1962] 1 QB 237, [1961] 3 All ER 740, CA;

I

(q) *Addis v. Crocker* [1961] 1 QB 11, [1960] 2 All ER 629, CA;

(r) *Trapp v. Mackie* [1979] 1 All ER 489, [1979] 1 WLR 377, HL;

(s) *Neill v. Henderson* [1901] 3 F 387;

(t) *Slack v. Barr* [1918] 1 SLT 133;

(u) *Scott v. Stansfeld* [1868] LR 3 Exch 220;

(v) *Anderson v. Gorrie* [1895] 1 QB 668 at 671, CA;

(w) *Watson v. M'Ewan* [1905] AC 480, HL;

(x) *Seaman v. Netherclift* [1876] 2 CPD 53 at 57, CA;

(y) *Lynam v. Gowring* [1880] 6 LR Ir 259; and

(z) *Minter v. Priest* [1930] AC 558, HL.

[17] It is also recommended to read the following authorities:

(1) *Chatterton v. Secretary of State for India* [1895] 2 QB 189, CA;

(2) *M. Isaacs & Sons Ltd v. Cook* [1925] 2 KB 391;

(3) *Fayed v. Al-Tajir* [1988] QB 712, [1987] 2 All ER 396, CA;

(4) *Duncan v. Cammell Laird & Co Ltd* [1942] AC 624, [1942] 1 All ER 587, HL;

(5) *Conway v. Rimmer* [1968] AC 910, [1968] 1 All ER 874, HL;

(6) *Dawkins v. Lord Paulet* [1869] LR 5 QB 94;

(7) *McCarey v. Associated Newspapers Ltd* [1964] 2 All ER 335 n, [1964] 1 WLR 855;

(8) *Farmer v. Hyde* [1937] 1 KB 728, [1937] 1 All ER 773, CA;

(9) *Rogers v. Home Secretary* [1973] AC 388, [1972] 2 All ER 1057, HL;

(10) *Riddick v. Thames Board Mills Ltd* [1977] QB 881, [1977] 3 All ER 677, CA;

(11) *Hasselblad (GB) Ltd v. Orbinson* [1985] QB 475, [1985] 1 All ER 173, CA; and

(12) *Conerey v. Jacklin* [1985] Crim LR 234, CA.

A **[18]** In regard to qualified privilege, an action will not succeed unless the plaintiffs can prove that in publishing the words complained of the 3rd defendant was actuated by express malice and this would include out of spite or ill-will or some other wrong or improper motive.

B

[19] Malice would defeat the defence of qualified privilege. Malice is totally and wholly irrelevant to absolute privilege. The defences of qualified privilege and absolute privilege exist not for the purpose of licensing the defamer to defame but rather they are C "for the common convenience and welfare of society". (*Toogood v. Spyring* [1834] 1 Cr M & R 181 at 193, per Parke B.).

[20] Now, it is indisputable that the 1st defendant as a member of the ATCM has an interest in the matters raised in the 1st D defendant's letter to the ATCM. Likewise, it is equally indisputable that the ATCM and its members have a corresponding interest in the same matter (*K Surjit Kaur a/p Gean Kartar Singh v. Belinda Ghoi Shuk Yee* [2003] 2 MLJ 91). As I said, in law, the plaintiffs in a defamation claim can overcome E publication on an occasion of privilege by proving that the relevant publication was actuated by malice. The only malice alluded to in the plaintiffs claim herein is that of the 1st defendant. Sadly, the plaintiffs have not pleaded malice on the part of the 3rd defendant. In a desperate attempt and following the filing of the F 3rd defendant's application in encl. 11, the plaintiffs have included an averment in the plaintiffs' affidavit suggesting that the 3rd defendant had maliciously published the 1st defendant's letter. Such an averment is completely absent from the pleadings and it is trite law that the plaintiffs here must plead all the material facts G and that any defect or omission in the statement of claim cannot be subsequently made good by affidavit evidence (*United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors*. [1982] CLJ 547; [1982] CLJ (Rep) 358, FC; and *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corp Bhd and Another Suit* [2003] 2 CLJ 520). Suffice for H me to say that there is nothing in the plaintiffs' claim which suggests that the 3rd defendant will not be able to successfully rely on the defence of privilege in relation to the 1st defendant's letter to the ATCM.

I **[21]** Having heard the submissions of the plaintiffs' counsel, I must say that the plaintiffs' counsel submissions characterise the issue of the plaintiffs' failure to allege malice in the pleadings as

being petty, technical and inconsequential. With respect, the plaintiffs' counsel are either deliberately obfuscating the issue of malice or have missed the point entirely. The relevance of the plaintiffs' failure to allege malice against the 3rd defendant can best be understood when the plaintiffs' claim and the plaintiffs' evidence are seen in totality. Everything must be viewed in its correct perspective and the following pertinent matters ought to be considered:

(a) that the plaintiffs' pleadings consistently maintain that the 3rd defendant had acted merely as the representative and an employee of the 1st defendant;

(b) that the plaintiffs' own evidence reinforces their pleadings on point (a);

(c) that there is nothing in the pleadings to suggest that the 3rd defendant had acted maliciously in her personal capacity or had any ulterior or other motive in issuing the 1st defendant's letter to the ATCM; and

(d) that the plaintiffs' claim does not contain any averment nor make any suggestion that the 3rd defendant had acted as an independent tort feasor.

[22] In my judgment, in the absence of any allegation of malice, the case against the 3rd defendant based on the plaintiffs' claim is this. That the 3rd defendant was merely the passive conduit pipe through which the 1st defendant, being an artificial entity, had issued that controversial letter dated 5 November 2004 – referring to the 1st defendant's letter to the ATCM. It must be borne in mind that the parties are bound by their pleadings and that the tort of defamation requires a special treatment in so far as drafting the statement of claim is concerned. In my judgment, in failing to allege malice in the statement of claim against the 3rd defendant, the plaintiffs have failed to set out a crucial element of a cause of action against the 3rd defendant. I have said in *Baharuddin Ali & Co v. BPMB Urus Setia Sdn Bhd & Anor (supra)* at p. 698, which must surely apply in adjudicating encl. 17, that:

> ... the pleadings must be shaped and fashioned in the context of the draftsmen. Inefficient preparation of pleadings would invariably result in dire consequences.

A **The Plaintiffs' Claim Is Frivolous, Vexatious And An Abuse Of The Process Of The Court In Relation To The 3rd Defendant**

[23] The ATCM's response clearly indicates that the 1st
B defendant did have a legitimate right or interest as a member of the ATCM to make the queries contained in the 1st defendant's letter to the ATCM. The plaintiffs were aware of the ATCM's response and yet they proceeded to file these proceedings without disclosing it. The plaintiffs too have failed to give any reasonable
C explanation for omitting to plead the ATCM's response. In my judgment, there is no legitimate basis or explanation for the plaintiffs to file a claim against the 3rd defendant (who would have a *prima facie* defence of privilege) and yet the plaintiffs failed to plead malice on the part of the 3rd defendant.

D **No Pre-action Demand Made Against The 3rd Defendant**

[24] Prior to the filing of the proceedings herein the plaintiffs had through their solicitors issued a pre-action letter of demand against the 1st defendant and the 2nd defendant seeking, *inter alia*, an
E apology and compensation of RM3 million arising from the publication of the 1st defendant's letter to the ATCM. It is pertinent to note that none of the matters in the pre-action demand against the 1st defendant and the 2nd defendant relate to the 3rd defendant. No allegation or complaint is levelled against
F the 3rd defendant. There is simply no mention or reference to the 3rd defendant at all. It is interesting to note that no pre-action letter of demand similar to the ones that were sent to the 1st and 2nd defendants was ever issued by the plaintiffs or the plaintiffs' solicitors against the 3rd defendant in her personal capacity.

G **Conclusion**

[25] For the reasons as set out in this judgment, I allow the 3rd defendant's appeal in encl. 17 with costs. This means that the
H plaintiffs' claim and action against the 3rd defendant should be struck out forthwith.

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